IN THE HIGH COUR OF UTTARANCHAL AT NAINITAL

Criminal Jail Appeal No.267 of 2004

Harish S/o Hargyan
R/o Bahadur Pur Jat
Thana- Pathri
District Haridwar ……Appellant

Versus

State of Uttaranchal …….Respondent.

Shri Pramod Tiwari, learned Amicus Curiae for the appellant.
Shri Rajeev Mohan Birkhani, learned A.G.A. for the State.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (for brevity herein after referred as Cr.P.C.) is directed against the judgment and order dated 7/10.06.2004, passed in Sessions Trail No. 190 of 2001, by learned Sessions Judge/Fast Track Court II, Haridwar, whereby appellant Harish, has been convicted under Section 394/397 and 307 of Indian penal Code, 1860 (for brevity herein after referred as I.P.C.). Each one of them were sentenced to rigorous imprisonment for a period of five years under Section 394 I.P.C. and to pay fine of Rs., 1,000/- rigorous imprisonment for a period of seven years under Section 397 I.P.C. and rigorous imprisonment for a period of eight years under Section 307 I.P.C. and to pay fine of Rs. 2,000/-. The trial court directed that all the sentences would run concurrently. In default of payment of fine of Rs. 1,000/-, the defaulter was directed to undergo simple imprisonment for a period of three months and in default of payment of fine of Rs. 2,000/- the defaulter was directed to undergo simple imprisonment for a period of six months.

2. Heard learned counsel for the parties.

3. Prosecution story in brief is that P.W. 1 Sanjay Kumar, reported on 27.09.2000, at about 12:35 P.M. to the police station Pathri that on the previous day (26.09.2000), at about 7:30 P.M., two miscreants, armed with country made pistols, looted Rs. 1,700/- from the country liquor shop where the informant was working as salesman. On being raised alarm by the informant, P.W. 2 Amrik Singh, who was selling the eggs outside the liquor shop, shouted 'Gher Lo!-Gher Lo!' (ROUND UP! ROUND UP!) on which a canteen wala, P.W. 2 Susheel Kumar also came there. While fleeing, accused persons gave a blow with butt of the country made pistol on the head of Susheel Kumar and fired shots at Amrik Singh. Amrik Singh was immediately rushed to the hospital for treatment. The police station, registered the case as crime No. 100 of 2000, and the same was investigated by P.W. 6 Yogendra Pal Singh, Investigation Officer. The accused Ramesh and accused/appellant Harish though not known to the informant but they were known to P.W. 3 Amrik Singh and P.W. 2 Susheel Kumar. On completion of investigation, charge sheet was filed against both the accused for their trial in respect of offences punishable under Section 394/397 I.P.C. and 307 I.P.C.

4. The Magistrate, on receipt of charge sheet, it appears, after giving necessary copies to the accused, committed the case to the Court of Sessions, for trial. Learned trail court after hearing the prosecution and the

defence, framed charge of offence, punishable under Section 394/397 I.P.C. and 307 I.P.C. against both the accused, who pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Sanjay (informant), P.W. 2 Susheel Kumar (eye witness), P.W. 3 Amrik Singh (injured eye witness), P.W. 4 S.I. Rajesh Chand Sharma, P.W. 5 A.S.I. Rajveer Singh, P.W. 6 S.I. Yogendra Pal Singh and P.W. 7 Pharmacist Vimal Chand. The oral and documentary evidence was put to the accused persons in reply to which they alleged that they have been falsely implicated. After hearing the parties, the trail court found both the accused guilty of offence punishable under Section 394/397 I.P.C. and 307 I.P.C. after hearing them on sentence, sentenced each one of them to the period, as mentioned above.

5. Before further discussions, it is pertinent to mention here that following injuries were found on the person of P.W. 3 Amrik Singh, recorded by Medical Officer in Ext. A-4:-

1. **Fire Arm wound of entry:- in an area measuring 12cm X 11 cm X bone deep on left axilla and upper part of back of left upper arm. Blackening and tattooing present. Bleeding present.**
2. **Fire arm wound of entry in an area measuring 8cm X 1.5cm depth not probed on the left side of the chest. 12°clock position from left nipple. Blackening and**

tattooing present. Bleeding Present.

3. **Multiple abrasions in an area of 13cm X 12cm, left side of chest, around left nipple.**
4. **Lacerated wound 1.5cm X .5cm X muscle deep, left side of face on lateral part of left eyebrow. Bleeding present.**
5. **Lacerated wound 1.2cm X 0.3cm X muscle deep on left side of face extending to the angle of left eye. Bleeding present.**

6. P.W. 1 Sanjay Kumar (informant), while narrating the prosecution story, has stated that on 26.09.2000, he was sitting as a salesman in a country liquor shop when at about 7:30 P.M., two boys came and looted Rs. 1,700/- from the sales counter. The witness further states that on raising alarm, Susheel Kumar (P.W. 2) and Amrik Singh (P.W. 3), came to his rescue but Susheel was given a blow from the butt of the pistol and Amrik Singh was fired at by the miscreants, who succeeded in their escape from the scene of occurrence.

7. P.W. 2Sushil Kumar (eye witness), has corroborated the statement of informant Sanjay Kumar (P.W. 1). He has further stated that he knew the accused Ramesh and accused/appellant Harish, who were armed with country made pistol and committed the crime, as stated above. This witness is a canteen wala, working near the place of

occurrence and is a natural witness. P.W. 3 Amrik Singh is also a natural and trustworthy witness, who got injured in the incident while coming to the rescue of the informant Sanjay. This witness has also corroborated the porsecution story, as stated above. His evidence gets support from the medical evidence, quoted above. This witness states that he used to sell eggs for several years near the shop in question and knew both the accused Ramesh and Harish, as they used to come at times to have eggs in his shop. There is nothing, which makes the testimony of the eye witnesses doubtful. The evidence adduced by the witnesses is reliable beyond all reasonable doubt. Therefore, this Court is in agreement with the finding of the trail court that the porsecution has been successful in proving the charge against the accused/appellant Harish and the co-accused Ramesh.

8. Learned Amicus Curiae on behalf of the appellant Harish, argued that the sentence awarded to the appellant is too severe. I have considered the said submission also. As far as the sentence awarded under Section 394/397 I.P.C. is concerned, imprisonment for a period of seven years could have been awarded which is the minimum sentence. However, as to the sentence awarded under Section 307 I.P.C. is concerned, the period of seven years would have met the ends of justice. Apart from this, this Court is of the view that the sentence awarded under Section 397 I.P.C. separately is not tenable in law and it should have been awarded under Section 394 read with Section 397 I.P.C. Accordingly, though the appeal is liable to be dismissed on the point of conviction but on the

point of sentence, it deserves to be allowed partly. The appellant Harish shall stand convicted under Section 394 read with Section 397 I.P.C. and of the offence punishable under Section 307 I.P.C. The sentence awarded to him under Section 394 read with 397 I.P.C. is reduced to rigorous imprisonment for a period of seven years only (instead of rigorous imprisonment for a period of eight years and fine of Rs. 2,000/-). Since the appellant has been convicted and sentenced under section 394 read with Section 397 I.P.C., as above, sentences separately awarded under two counts under said Sections, are set aside. With these modifications in the sentence, this appeal is disposed of.

9. In the result the appellant is required to undergo sentence of rigorous imprisonment for a period of seven years under Section 394 read with 397, and seven years under Section 307 I.P.C. Both the sentences to run concurrently. (It appears that appellant has already undergone so far some six years imprisonment, which shall be adjusted against the sentence awarded as above). The trial court, and the Superintendent of jail where the appellant is serving out the sentence, shall be informed about the reduction in sentence by the registry of this Court.

Dt.31.10.2006 **(Prafulla C. Pant, J.)**
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